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No. 85-1096

In the Supreme Court of the United States

OCTOBER TERM, 1985

VICTOR H. VAN SANT, PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner, who was awarded back pay for a three-month period in 1971 after he was terminated by the Postal Service, claims that he is entitled to reinstatement and back pay up to the present.

1. When the United States Post Office Department was reorganized as the United States Postal Service on July 1, 1971, petitioner was employed as a planning architect in the Research and Development Department. Petitioner, who is not a professional architect, developed rough plans known as "functional design specifications" for use by professional design architects. As part of the reorganization, the design architects and the functions they performed were transferred to the Army Corps of Engineers. Pet. App. A9-A11. Petitioner's position was abolished and his job of developing functional design specifications was divided among three industrial engineering technicians at the Postal Service, who performed other tasks that petitioner could not

perform (*id.* at A22). After determining that there were no positions within the Postal Service to which petitioner had any transfer rights, the Postal Service notified petitioner on August 27, 1971, that he would be terminated, and he was terminated on October 12, 1971 (*id.* at A6 n.1).

Petitioner challenged the propriety of his termination. He contended that his job had been transferred to the Corps of Engineers and that he was entitled to a job with the Corps (Pet. App. A66, A100). After the Civil Service Commission and the district court rejected his claims, the court of appeals remanded petitioner's case to the Merit Systems Protection Board (the successor to the Civil Service Commission) in 1979 to conduct "a complete evidentiary hearing on the issue of whether [petitioner's] job function was transferred to the Corps of [E]ngineers or to any other department, and whether, if so, [petitioner] was entitled to a transfer to the receiving agency" (*id.* at A107). On remand, the Board found that petitioner's job had not been transferred to the Corps of Engineers and the district court affirmed, but the court of appeals again reversed and remanded to the Board with instructions to "develop fully a record directly addressing the issues in dispute" (*id.* at A74). In particular, the court instructed the Board to determine the nature of the work performed by four design architects who were detailed from the Corps of Engineers to the Postal Service in 1971 and the reasons why any work preparing functional design specifications was not assigned to petitioner during the period of time that the design architects were detailed to the Postal Service (*id.* at A74-A75).

On remand the Board again determined that petitioner was not entitled to relief (Pet. App. A27-A58). The district court, however, determined that the design architects detailed from the Corps of Engineers had actually performed the work petitioner had been doing until December

7, 1971 (*id.* at A6-A24). It therefore concluded that the Postal Service should not have terminated petitioner until the detail ended on December 7, 1971 (*id.* at A16-A17) and awarded him back pay as if he had been notified of his termination on that date (*id.* at A26).[1]

The court of appeals affirmed in an unpublished opinion (Pet. App. A1-A5). It approved the district court's finding that petitioner's "duties were validly dispersed among other positions" (*id.* at A5). It also concluded that there is "no merit in [petitioner's] contention that he is entitled to reinstatement and back pay to the date of reinstatement" (*ibid.*).

2. The decision of the court of appeals is correct, does not conflict with any decision of this Court or of any other court of appeals and presents no issue of significance. Accordingly, further review is not warranted.

Petitioner contends that he is entitled to reinstatement and back pay from 1971 to the present. He is clearly not entitled to reinstatement with the Postal Service. The court of appeals, the district court, and the Board all agreed that petitioner's job was validly abolished in 1971. As the district court stated, "[t]here was just no place for an 'architect' with the [petitioner's] credentials in the reorganized Postal Service, and the Service was not required to create one" (Pet.

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[1]While the district court did not state precisely how much back pay petitioner should receive, it clearly intended that he should be paid for the 56-day period from October 12 to December 7, 1971. We assume that, by stating that petitioner should receive the salary "he would have been paid had the notice of termination been given on December 7, 1971" (Pet. App. A26), the court intended petitioner to receive an additional sum to compensate him for the time between the notice of termination, had it been given on December 7, and his actual termination. There was a 39-day period between the date petitioner was notified of his termination and his original termination date (Pet. App. A6 n. 1). Thus the court ruled that petitioner is entitled to approximately three months' back pay.

App. A23). Likewise, each tribunal rejected petitioner's claim that he should have been transferred to the Corps of Engineers. The district court explained that "the design architects who were transferred to the [Corps of Engineers were] * * * professional architects concerned with the actual building design and construction, tasks not within the [petitioner's] responsibility or expertise" (*id.* at A10-A11).

Petitioner's claim that he is entitled to back pay is also frivolous. Back pay is intended to recompense an employee for amounts he would have earned had an erroneous personnel action not occurred. Back pay is not intended to put an employee in a better position than he would have occupied had an erroneous agency action never taken place. See *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 419-421 (1975). It would make no sense to grant petitioner a windfall in the form of 14 years' back pay because the district court found that he was dismissed three months early. Courts undoubtedly have discretion to limit back pay awards to periods during which an employee would have had a job if proper procedures had been followed.[2] Petitioner cites no authority supporting such an award.[3]

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[2]In *Kozak* v. *United States*, 458 F.2d 39 (Ct. Cl. 1972), for example, a federal employee was terminated because his position was abolished. The Court of Claims determined that the termination was improper because the employee should have been transferred to another position that he sought. That position, however, was subsequently abolished as well. The Court of Claims determined that the employee was entitled to back pay only until such time as the position to which the employee should have been transferred was abolished. *Id.* at 41-42.

[3]Petitioner cites (Pet. 30-34) a number of cases that generally provide that back pay statutes are intended to provide "full" or "complete" relief. These cases do not support petitioner's claim since he was granted complete relief.

Petitioner notes (Pet. 17 (emphasis omitted)) that the Court stated in *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), that courts " 'must judge the propriety of [an agency] action solely on the grounds invoked by the agency.' " He argues that he is entitled to 14 years' back pay because the courts determined that he should not have been notified of his termination until December 1971 while the Postal Service never made such a determination. Petitioner's argument is insubstantial. This case, unlike *Chenery*-type cases, does not involve judicial creation of a rationale for agency action not advanced by the agency itself. Here the Postal Service, like the reviewing courts, stated that petitioner was terminated because his position was abolished and there was no other job that he could perform. The only disagreement was that the courts determined that the Postal Service should not have terminated petitioner until the architects detailed from the Corps of Engineers had ended their service.[4] The award of three months' back pay fully compensated petitioner for the Postal Service's error.

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[4]Therefore, contrary to petitioner's claim (Pet. 19-20), the decision in *Horne* v. *MSPB*, 684 F.2d 155 (D.C. Cir. 1982), does not support his argument. In *Horne* the ICC demoted two employees without following formal reduction-in-force procedures because the demoted employees were erroneously considered to be political employees who could be demoted summarily. The Board subsequently approved the demotions, despite the error, because it concluded that the ICC could have demoted the employees after following reduction-in-force procedures if the ICC had made certain discretionary determinations. The court of appeals reversed and remanded the case to the ICC, citing *Chenery* and stating that the Board should not have determined what the ICC might have done had it followed proper procedures (684 F.2d at 157-158), although it noted that "[i]t would obviously be wasteful to send a decision back to an agency for further action if facts already established make such further action by the agency predetermined" (*id.* at 158 n.4). It would clearly be wasteful to send this case back for further proceedings.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

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